STATE OF MICHIGAN

IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
AND WORKERS' COMPENSATION APPELLATE COMMISSION

JAMES A. LOOS, JR.,

Plaintiff-Appellee,

v

ROBINSON ROOFING,
Uninsured,

Defendant-Appellee,

and
J. B. INSTALLED SALES, INC. and
ACCIDENT FUND INSURANCE COMPANY
OF AMERICA,

Defendants-Appellants.

S.C. NO.: 137987

C.A. NO.: 275704

L.C. NO.: WCAC 05-000246

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DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF FACTS

> (Numbers in parentheses refer to the pages of the trial transcript of May 31, 2005, which is mislabeled on the cover sheet of the transcript as May 31, "2004," unless otherwise indicated. Numbers preceded by "N" refer to the pages of the deposition of Dr. Nowinski. Numbers preceded by "B" refer to the pages of the deposition of Dr. Buszek.)

Defendants adopt the Statement of Facts contained in their pending application for leave to appeal. The only additional fact necessary is that the Court entered an order on May 1, 2009 in response to defendants' application. The Court ordered:

> On order of the Court, the application for leave to appeal the November 20, 2008 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. (Court's order, entered May 1, 2009).

Defendants supplement their pending application as follows.

ARGUMENT

CONTRARY TO PLAINTIFF'S CONTENTION IN BRIEFING, DEFENDANTS' POSITION IS NOT THAT THE FINDERS OF FACT ARE REQUIRED TO ACCEPT INCOME TAX AND SOCIAL SECURITY RECORDS AS CONTROLLING. INSTEAD, DEFENDANTS ADVOCATE CONTINUATION OF WELL-ESTABLISHED COURT OF APPEALS AND WORKERS' COMPENSATION APPELLATE COMMISSION CASE LAW THAT RECOGNIZES SUCH RECORDS TO BE AMONG THE MOST RELEVANT AND PERSUASIVE FACTORS INFORMING THE STATUTORY INQUIRY INTO WHETHER PLAINTIFF IS SELF-EMPLOYED. THE REAL ISSUE IS WHETHER INCOME TAX AND SOCIAL SECURITY RECORDS CONSTITUTE "SUBSTANTIAL EVIDENCE." PRIOR CASE LAW SAYS THEY DO.

In answering defendants' application, plaintiff says "defendant suggests that the WCAC was *required* to accept these [income tax and social security] records as controlling." (Plaintiff's Answer, p 7, pp 11-12; bracketed words are defendants'). Plaintiff misstates defendants' position. To clarify, defendants advocate continuation of well-established Court of Appeals and Appellate Commission case law that holds income tax and social security representations, while not dispositive, constitute substantial evidence upon which a trial Magistrate can rely. In reversing the trial Magistrate, the Appellate Commission misapprehended its administrative appellate role by concluding the instant trial Magistrate had no "substantial evidence" to substantiate his holding. MCL 418.861a(3).

Reliance on income tax and social security records, along with other evidence, has been the norm[1] for resolving the question whether a workers' compensation claimant maintains a separate business or holds himself or herself out to and renders service to the public, which is the statutory criteria at issue. MCL 418.161(1)(n).[2] The Court of Appeals' and Appellate Commission's viewpoint in this case is that, since reference to such records is not recited in the statute itself, reliance on them by the trial Magistrate was improper. That viewpoint is erroneous. While reference to such records is not recited in the statute, reference to such records is an accepted evidentiary means to answer the question posed by the statute. There was, therefore, no error in the Magistrate adhering to the factual inquiry previously recognized by the Courts as informative for resolving the statutory question.

It is not unusual that evidentiary factors develop via case law and become accepted aids to resolve questions posed by a statute. A few examples of the phenomena in the workers' compensation arena are worthwhile.[3]

For certain specified conditions, the workers' compensation statute requires that claimants demonstrate work contributed "in a significant manner" toward a pre-existing condition for the condition to be deemed compensable. MCL 418.301(2).[4] To determine whether work's contribution is "significant" (and, thus, compensable) or only insignificant (and,

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[1] Besides the cases cited in defendants' application, other cases making this point include: *Trzcienski v Maple Ridge Building, Inc*, 2006 ACO #182; *Brooks v A & R Transportation, LLC*, 2003 ACO #286; *Stark v Linda Cab Co*, 2003 ACO #239; *Hessler v Malone Freight Lines, Inc*, 2003 ACO #60; *Wheelock v X-Cel Transport, Inc*, 1999 ACO #508.

[2] There is no dispute in this case that if plaintiff fits within any one of § 161(1)(n)'s exclusions, he does not meet the definition of employee. (Plaintiff's Answer, pp 5-6, p 12; Commission's opinion, pp 4-5).

[3] This phenomena is of course not confined to workers' compensation. *E.g.*, MCL 500.3148(1) and *Wood v Detroit Automobile Inter-Insurance Exchange*, 413 Mich 573, 588; 321 NW2d 653 (1982) [factors for determining attorney fees under no fault automobile insurance law]; *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006) [factors for determining right to speedy trial under Michigan and federal law].

[4] "Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner." [First sentence.]

thus, non-compensable), this Court and the Appellate Commission have developed different factors to be examined. This Court in *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993) identified the following relevant factors:

> Even though a claimant's everyday work activities might contribute to a heart injury in a significant manner, a factfinder must also consider the causal effect of everyday work activities in relation to the claimant's other, nonoccupational factors. These factors would include, for example, age, weight, diet, previous cardiac ailments or injuries, genetic predispositions, and the claimant's consumption of alcohol and use of tobacco or other drugs. *Farrington*, 442 Mich at 217 n 17.

See also, *Martin v City of Pontiac School District*, 2001 ACO #118 ["To apply this new definition, we offer a multi-factor test to assist magistrates in the exercise of their fact-finding discretion."]. While the *Farrington* and *Martin* factors are not in the statute itself, reference to such factors is designed to help the finder of fact determine how to decide whether work's contribution was significant or not. Compare, *Lombardi v William Beaumont Hospital (On Remand)*, 199 Mich App 428, 436; 502 NW2d 736 (1993).

The workers' compensation statute also requires that claimants provide their employers with notice of an injury within a certain timeframe. MCL 418.381(1).[5] But, the statute excuses the claimant's failure to provide timely notice "unless the employer can prove that he or she was prejudiced by the failure to provide such notice." MCL 418.381(1). Factors developed over time via case law to determine what constitutes "prejudice." *E.g.*, *Williams v Chrysler Corp (On Remand)*, 209 Mich App 442, 448; 531 NW2d 757 (1995) ["Prejudice can arise, under appropriate circumstances, when untimely notice actually prevents an employer from investigating an accident and injury or prevents an employer from providing essential

[5] "The employee shall provide a notice of injury to the employer within 90 days after the happening of the injury, or within 90 days after the employee knew, or should have known, of the injury."

medical treatment."]; *Mills v Hardee's Food Systems, Inc*, 1998 ACO #773 [destruction of records can constitute prejudice]; *Coffin v General Safety Corp*, 1996 ACO #169 [prejudice can arise from failure to disclose condition precluded employer from determining post-injury aggravating activities].

Another example is the workers' compensation statute's "arising out of and in the course of employment" formula for determining coverage. MCL 418.301(1); *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444, 446; 320 NW2d 858 (1982). To make the statutory determination of whether an injury is one "arising out of and in the course of employment" where a claimant is traveling to or from a worksite, the Courts have developed different factors to guide resolution of that statutory question. *Bush*, 413 Mich at 452 n 6 [recites six factors that inform the inquiry]; *Forgach v George Koch & Sons Co*, 167 Mich App 50, 57-58; 421 NW2d 568 (1988) [reiterates case law's identification of four discrete factors "'relevant to the ultimate determination of whether an injury to an employee while on the way to work is sufficiently employment related.'"].

Finally, the workers' compensation statute contains an enhanced level of benefits for claimants determined to be totally and permanently disabled. MCL 418.361(3). Over the years, case law developed a series of factors to help determine when the condition is sufficiently severe so as to qualify as a "total and permanent" disability. *Burke v Ontonagon County Road Comm*, 391 Mich 103, 110-114; 214 NW2d 797 (1974) and *DeGeer v DeGeer Farm Equipment Co*, 391 Mich 96; 214 NW2d 794 (1974) [summaries of factors to be used in determining when use of the legs has been so severely compromised that it attains total and permanent disability status]; *Redfern v Sparks-Withington Co*, 403 Mich 63; 268 NW2d 28 (1978) [identification of different factors for determining whether a claimant's mental problem attained social or

cognitive levels so as to qualify as "insanity or imbecility" as required by the total and permanent disability provision].

In short then, the income tax and social security inquiries developed over time for informing resolution of the statutory question posed by § 161(1)(n) are no different than the development of factors to inform resolution of other statutory provisions. Identifiable, consistent factors aid the finders of fact in making determinations required by statute. The factors identified by this Court in *Farrington* as relevant for making the "significant manner" determination in § 301(2) do not appear in the statute either. That does not make reference to such factors legal error.

The trial Magistrate in this case relied upon factors the Court of Appeals (and prior Appellate Commission opinions) identify as very relevant for resolving the § 161(1)(n) question. The Appellate Commission and the Court of Appeals thought that was error in this case. But, the error is the Appellate Commission's reversal of the Magistrate on this point. It is error because the Appellate Commission's standard for reviewing the question resolved by the Magistrate is not unlimited. The Appellate Commission's statutory scope of review "does not connote a de novo review by the WCAC of the magistrate's decision." *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 700; 614 NW2d 607 (2000). Directly to this point, the Court has explained:

> Clearly, it would be improper for the WCAC to engage in its own statutorily permitted independent fact finding *if "substantial evidence" on the whole record existed supporting the decision of the magistrate.* *Mudel*, 462 Mich at 700; see also, pp 709-710 (italics are defendants').

Here, the trial Magistrate's reliance on income tax and social security records *was* substantial evidence. The Court of Appeals has explicitly so held in *Blanzy v Brigadier General Contractors, Inc,* 240 Mich App 632; 613 NW2d 391 (2000). *Blanzy* said:

> The magistrate found that plaintiff ran his own business in relation to HCM's services. Her finding was primarily based on plaintiff's method of paying taxes. Plaintiff and his accountant testified regarding plaintiff's individual tax returns and those for HCM for the years 1988 through 1990. The corporate returns do not list wages or salaries paid or compensation to officers, but list payments for subcontractor services. On his federal taxes, plaintiff reported both wages and business income, and he identified his business as heating and air conditioning. Plaintiff's accountant testified that a portion of the subcontractor services reported by HCM was plaintiff to plaintiff and reported on his individual income tax return as part of his business income. The magistrate stated:
>
> > [P]laintiff listed his occupation on his individual income tax returns as "self-employed," he filed social security self-employment tax, his U.S. Individual Income Tax Returns reflected business income rather than wages or salary and he filed a schedule C, Profit or Loss from Business (Sole Proprietorship).
>
> *We find that this constitutes substantial evidence for the magistrate's finding that plaintiff ran his own business, and that the WCAC should have deferred to this finding. Blanzy*, 240 Mich App at 642-643 (italics are defendants').

Likewise, the instant trial Magistrate's reliance on, amongst other things, income tax and social security forms was reliance on "substantial evidence." The Appellate Commission and Court of Appeals should have recognized that.

Another of plaintiff's arguments has been that plaintiff's "actions," rather than mere "labels," should control resolution of whether plaintiff was an employee of Robinson Roofing or an independent contractor. Defendants agree. But, the Appellate Commission – in reversing the Magistrate – rejected the Magistrate's reliance on plaintiff's "actions" in filing his

income taxes. Those tax filings took care to distinguish between plaintiff's work for entities for whom he worked as an independent contractor and those for whom he worked as an employee (defendants' Exhibit B).[6] The Appellate Commission then ironically quoted the completely conclusory labeling by plaintiff of his relationship with Robinson Roofing that did nothing but parrot the statute's words. (Commission's opinion, p 5). Recall as well plaintiff's "actions" at the hospital where he characterized himself as self-employed (defendants' Exhibit A). And, plaintiff's testimony that he considered himself "'somewhat self-employed.'" (Magistrate's decision, p 7; 53).[7]

Finally, plaintiff argued in his Answer that "William Robinson ... imposed the structure of the relationship upon plaintiff" and, therefore, "[p]ermitting an employer to avoid workers' compensation liability by simply paying wages without withholding taxes ... sets a dangerous precedent." (Plaintiff's Answer, p 12, p 8, respectively). There is no evidence at all Mr. Robinson "imposed the structure" of payment upon plaintiff against plaintiff's will. Plaintiff points to no such evidence. There is no finding anywhere below to that effect. Mr. Robinson is plaintiff's *cousin*, not an autocratic stranger imposing his will on plaintiff (46).[8]

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[6] That distinction comported with other evidence, such as the method of payment to plaintiff – either payment by the hour or payment by "piecework." Payment by the hour is reflective of "employee" status. Payment by "piecework" is reflective of work as an independent contractor. Payment to plaintiff for the work at issue here was via piecework, not hourly pay (50-51). Recall that in the year of his injury (2003), plaintiff worked for Mid Michigan Roofing and Local Roofing where he was paid by the hour. (Magistrate's decision, p 6). He was considered an "employee" of those two concerns and filed his income tax forms in accord with that classification (defendants' Exhibit B). By contrast, plaintiff worked for Above Board Roofing and Robinson Roofing where he was paid in cash by the amount of pieces he installed (defendants' Exhibit B; Magistrate's decision, p 6, p 8). Plaintiff's income tax forms reflect he was not an employee but an independent contractor while working for these concerns (compare W-2s with Form 1099s in defendants' Exhibit B). Social Security Administration records similarly reflect only social security earnings for the two employers where plaintiff was an hourly employee and not any wages earned for the two entities where plaintiff worked as an independent contractor (defendants' Exhibit D).

[7] The "actions" of other people also matter. Recall the other evidence the Magistrate relied on besides income tax and social security records. It included evidence of Mr. Robinson, the owner of Robinson Roofing, who swore he had no employees. (Magistrate's decision, p 16; defendants' Exhibit D). And, the testimony of Ms. Millay – specifically found credible by the Magistrate (Magistrate's decision, p 16) – was that she was never informed by Mr. Robinson that Mr. Robinson had hired "employees" to work for him. (Magistrate's decision, p 7; 65).

[8] Plaintiff received unemployment compensation benefits after his injury from "the company that his father owned." (Magistrate's decision, p 7). The entire work milieu at issue in this case suggests engagement of a family-type trade.

For these reasons, defendants submit the Appellate Commission and Court of Appeals have erred in holding that the trial Magistrate had no substantial evidence for finding plaintiff an independent contractor rather than an employee of Robinson Roofing.

RELIEF

WHEREFORE, defendants-appellants, J. B. Installed Sales, Inc. and Accident Fund Insurance Company of America, respectfully request that the Supreme Court reverse the Court of Appeals and Workers' Compensation Appellate Commission and reinstate the order of the Magistrate. If not, defendants submit the Court should grant leave to address the conflict in the Court of Appeals on the evidentiary significance of income tax reporting for MCL 418.161(1)(n) purposes.

Respectfully submitted,

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